General Questions Submissions to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Round 4 Hearing

Legal Aid NSW

Introductory remarks

Legal Aid NSW welcomes the opportunity to provide written submissions following Round Four of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Commission**).

Our submission focuses on funeral insurance and the case studies presented to the Commission on this topic. Our response to the general questions raised by the Commission is directly informed by the legal services we provide to consumers of funeral insurance and financial services. We have not responded to those questions that require answers outside our casework experience. We also suggest possible areas for reform and further areas of inquiry. We note we have previously provided a case study submission on the findings recommended to the Commission in respect of two case studies: Tracey Walsh and Kathy Marika.

The Commission has highlighted critical systemic issues in the conduct of funeral insurers and the sale and marketing of insurance products to Aboriginal and Torres Strait Islander people and communities (**Aboriginal people**, for brevity).

Through its casework experience Legal Aid NSW (**Legal Aid**) has observed that the conduct highlighted in the two funeral insurance case studies is apparent across the funeral insurance sector, with the impact of this conduct leading to particularly harsh outcomes for vulnerable Aboriginal people and communities. Legal Aid has provided advice and assistance to more than 100 Aboriginal people across New South Wales about the products sold by the Aboriginal Community Benefit Fund and related companies (**ACBF**). Disputes about the ACBF products are wide-ranging and include misrepresentations about the Aboriginality of the product and company, problems with the conduct at point of sale, and misrepresentations about key features of the product. It has been difficult to obtain outcomes for Aboriginal clients in relation to the ACBF products because of the refusal of ACBF to engage in negotiations and the significant gaps in the regulatory framework governing this product.

Many of the consumers Legal Aid has assisted have low literacy levels, are financially unsophisticated and often do not understand the product being sold to them. In relation to the ACBF products, many clients have never read the product information, and have a

limited ability to understand the significance of the oral information communicated to them in the sales process.

We believe ACBF would be aware of these issues as a result of their experience selling the product, and from the many complaints they have received from organisations assisting Aboriginal consumers. In these circumstances it is arguable that ACBF's conduct exploits these vulnerabilities, and that the written disclaimers and explanations in the transaction documents are not effective.

In addition ACBF markets its product aggressively in Aboriginal communities. In our experience, many of the people purchasing the product do not research alternative products to compare value. As a result of these factors there is limited effective competition for ACBF, which combined with the issues referred to above, allows them to sell a poor value product more easily.

In our view funeral insurance is generally ill suited to meet the needs of people whose families will struggle to cover the cost of a funeral. Unlike life insurance, the benefit amount is small and the premiums are high. Whilst life insurance is designed to cover someone's life at the height of their earning capacity to avoid undue hardship within a family due to the loss of a significant person, funeral insurance does not have a similar application.

Rather, funeral insurance insures a known and relatively small cost, approximately $5,000 - $15,000, and a known event. The only risk worth insuring is the timing. That is, if you are unlikely to die in the next 6-7 years, the cost of insuring the expenses of your funeral is very likely to exceed the value of the benefit. In this submission we advocate for a suitability assessment. However it is worth noting that in our view, most of the time funeral insurance is not fit for the purpose for which it is sold and consideration should be given to whether it is an appropriate product in almost any case.

Case studies: Kathy Marika & Tracey Walsh

Question: Is the current regulatory framework in respect of funeral expenses products adequate? In particular, should the framework be amended so that funeral expenses products are not excluded from the definition of financial product by virtue of section 765A(1)(y) of the Corporations Act and regulation 7.1.07D of the Corporation Regulations 2001.

The experience of Legal Aid in assisting clients with the current ACBF product demonstrates that the current regulatory framework is inadequate. The 'expenses only' exclusion in the *Corporations Act 2001* (Cth) (***Corporations Act***) means ACBF is not required to have an Australian Financial Services License (**AFSL**) and the product is not governed by the protections contained in Chapter 7 of the *Corporations Act*. The exclusion is also mirrored in

the *Life Insurance Act 1995* (Cth) (***Life Insurance Act***) and results in ACBF not having the requisite prudential standards of the Insurance Act 1973 (Cth) (***Insurance Act***).

We are of the view that amendment is required to include funeral expenses products within the definition of a 'financial product' so that the obligations outlined in Chapter 7 of the *Corporations Act* apply to issuers of 'expenses only' products such as ACBF. Amendments would need to ensure pre-paid funeral services covered by state based legislation are not inadvertently caught.

Question: Should section 12BAA subparagraph (8) subparagraph (o) of the ASIC Act be amended to put beyond doubt that funeral expenses policies are not excluded from the definition of financial product, as applicable to part 2 5 Division 2 of that Act?

The reference to funeral benefit in the *Australian Securities and Investment Commission Act 2001* (Cth) (***ASIC Act***) imports the definition of the *Corporations Act*, being *'a benefit that consists of the provision of funeral, burial or cremation services, with or without the supply of goods connected with such services'*. Our reading of the legislation is that Parliament intended to exclude services provided by funeral directors from the definition of 'financial product' in the ASIC Act whilst ensuring funeral insurers and expenses only products remained within scope. The same wording appears in the *Funeral Funds Act 1979* (NSW) (***Funeral Funds Act***) and is distinguished from a product where the benefit involves money, specifically '*the payment of money, upon the death of a person, for the purpose of meeting the whole or a part of the expenses of and incidental to the funeral of that person.'* The definition in the *Funeral Funds Act* supports our reading that the former phrase is not intended to encompass funeral insurance or expenses only products. However it is possible 'services' could be interpreted more broadly than this. Given the complexity of regulation in this area we are of the view that any ambiguity should be rectified.

Question: Is the current regulatory framework sufficient to minimise the risk of funeral insurance providers using inappropriate sales practices to sell their products to vulnerable people, including Aboriginal and Torres Strait Islander people living regionally or remotely?

No. In our view legislative reform is required to improve protections for vulnerable people, including Aboriginal people, to minimise the risk of insurers using inappropriate sales practices to sell funeral insurance.

Proposals for reform to address inappropriate sales practices are outlined below in further detail. In summary, they are:

i. The introduction of a suitability assessment requirement, including the presumption that insuring children is unsuitable or a total ban on insurance for children;

ii. Extension of the 'fit for purpose' test contained in section 12ED of the ASIC act to cover insurers;
iii. Introduction of unfair trading provisions;
iv. A comprehensive prohibition on unsolicited sales, including anti-avoidance provisions;
v. More robust disclosure requirements regarding total cost and other matters.

In addition, a proactive approach by ASIC through additional regulatory guidance and targeted use of enforcement would assist in this area.

In our view these changes would have a significant impact on the following inappropriate sales practices observed in our casework:

- Direct and high pressure sales;
- Misleading conduct including misrepresentations about the Aboriginality of the ACBF companies and the suitability of their products for Aboriginal people;
- Misleading conduct including misrepresentations about increasing cover;
- Misleading conduct including misrepresentations about the key features and essential terms of the product;
- Failure by the insurer to assess whether or not the product being sold is suitable for that consumer, including the sale of funeral insurance to cover children and infants;
- Sale of products in a manner that discriminates against people based on disability and race;
- Sale of products that in all the circumstances is unconscionable.

Suitability or 'fit for purpose' requirements in respect of funeral insurance

As with Kathy Marika, we often see Aboriginal people enter into funeral insurance contracts that are unsuitable, such as where:

- The consumer already has other types of funeral or life insurance including through superannuation;
- The product is or will become unaffordable due to increasing premiums and puts or will put the consumer into significant financial hardship;
- The product is unlikely to provide the benefit required (under insurance);
- The consumer is likely to pay far more than the benefit due to their age, health and life expectancy;
- The consumer is unlikely to ever obtain the benefit of the product due to cancellation before death (such as where the consumer has joined as a child or young person);

- The consumer intended to purchase a savings or investment type product and the product sold to them does not suit their needs;
- The product does not cover death in the event of suicide;
- The key features and/or terms of the products are unfair, unsuitable and unsafe for vulnerable consumers.

Both case studies highlight the need for a legislative obligation on insurers to conduct an assessment as to the suitability of any proposed insurance product for an individual consumer. Had a suitability assessment been conducted at the time the contracts were entered into with both Ms Marika and Ms Walsh, it is likely that those products would not have been sold to either of them.

Any such suitability assessment could be modelled on provisions set out in the *National Consumer Credit Protection Act 2009* (Cth) (***NCCPA***) such that the insurer is required to:

- Assess the suitability of the product for the consumer prior to the provision of insurance;
- Make reasonable enquiries and obtain verification as part of the assessment, such as enquiries about the consumer's financial circumstances and the their requirements and objectives in obtaining the policy;
- Presume the product is unsuitable in specified circumstances such as where the contract is likely to cause the consumer substantial financial hardship, where the policy will insure the life of a child or, where the insurance fails to meet the requirements and objectives stated by the consumer.

In our view, funeral insurance for children would be excluded under a suitability assessment framework. This could be clarified through the introduction of a presumption that policies for children are unsuitable. Alternatively, Legal Aid supports a total prohibition on funeral insurance for children.

Alternatively, the 'fit for purpose' test contained in section 12ED of the *ASIC Act* should apply to insurance markets to protect against insurance products being sold that are simply not fit for their purpose and are a danger to those who have purchased them.

Breach of a suitability requirement or a fit for purpose test should give rise to an actionable claim that is easily enforced by consumers without the need to bring an action in the Federal or Supreme Courts.

We would also support the introduction of unfair trading provisions[1] which would protect against business models designed to unfairly take advantage of the most vulnerable members of the community.

Need for a comprehensive prohibition on unsolicited sales

Based on our casework experience, many Aboriginal consumers who have products through ACBF entered these contracts as a result of unsolicited sales including door-to-door sales, unsolicited phone calls and unsolicited meetings at Aboriginal community based organisations. For example, Ms Walsh signed up with ACBF during the course of her employment at an Aboriginal health co-operative. The evidence of Mr Jones (who?) suggests this unsolicited sales method is due to increase in the future.

Given the concerns raised in evidence about misrepresentations as to ACBF's ownership and the benefits of the product to Aboriginal people, this kind of unsolicited sales practice is concerning. By aligning the sale of their product with community based organisations and events, they increase the perception in the community that the product is for the benefit of Aboriginal people.

In the case study of Ms Marika, Select avoided the prohibition on unsolicited sales for insurance products by engaging a third party to first contact Ms Marika to participate in a survey. In the course of that contact the representative obtained her consent to contact her in relation to the sale of funeral insurance. This example demonstrates the need for anti-avoidance provisions to ensure that financial service providers are not establishing systems for the sole or predominant purpose of avoiding the application of unsolicited sales provisions.

The unsolicited selling of financial products, including through door-to-door sales, is prohibited by the anti-hawking provisions contained in section 992A of the *Corporations Act.* Where this section is breached, s992A(4) gives the consumer a right of return and refund within one month of the relevant cooling off period. Breach of the provision is an offence but this provides no relief to a consumer seeking to remedy their detriment, and no relief at all beyond the one month cooling off period.

For financial products subject to the *ASIC Act*, section 12DMA provides that a consumer has no liability to pay for a product sold to them by way of unsolicited sales. The *Australian Consumer Law* and the *NCCPA* also have provisions seeking to regulate and provide relief from unsolicited sales. In addition, the language used to encompass unsolicited sales varies

[1] The UK has already enacted such legislation in the Consumer Protection from Unfair Trading Regulations 2008. The Regulations introduce a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards their customers. In Australia, we have no protection against trading business models which unfairly take advantage of the most vulnerable people in our communities.

across legislation including 'door to door' sales, 'anti-hawking', 'canvassing' and 'unsolicited' sales.

In our view there is a lack of consistency and coherence in the regulation of unsolicited sales of financial products. The existing protections cause confusion, do not have sufficient remedies and produce inequitable results for consumers.

We are of the view that a clear, comprehensive prohibition on unsolicited sales should be established for the financial services sector. A provision should be included in the *ASIC Act* that combines the anti-hawking provisions of the *Corporation Act* with specific consequences for breach including compensation so that all financial products are dealt with consistently. The carve outs that exist in section 992A(3) of the *Corporations Act* should be removed to create a comprehensive prohibition and to implement anti-avoidance provisions, similar to those elsewhere in the *Corporations Act*.

Disclosure of total cost and other matters

In Legal Aid's experience, many of our clients who sign up to funeral insurance have poor English literacy, limited education and poor financial literacy. In the vast majority of cases, the likely total cost of a funeral insurance product is not discussed with the consumer at the point of sale. In many cases, the risk that the cost of the funeral insurance might exceed any benefit paid out, and also the estimate total cost of the product, only becomes clear to our clients upon receiving legal advice.

It is clear from the evidence presented to the Commission that current disclosure practices are insufficient, and that Aboriginal consumers are particularly vulnerable to signing up to funeral insurance products that are inappropriate and unsuitable and which are fundamentally misunderstood.

Under s1013D of the *Corporations Act*, insurers are required to disclose a number of matters including any significant risks associated with holding the product. While it is reasonable that risks about total costs and the risk that benefits may be insufficient should be considered significant and hence disclosed, it is evident that in practice this does not occur.

Upfront disclosure at the point of sale may address some of the problems associated with inappropriate sales practices, such as occurred in both Ms Marika and Ms Walsh's cases. Section 1013D of the *Corporations Act* should be clarified to require disclosure by funeral insurers about the following matters:

- Estimated total cost based on life expectancy;

- Risk that the cost could likely exceed the benefit;
- The date when the premiums paid will exceed or equal the benefit amount to be paid out;
- The risk that the benefit might not cover the cost of a funeral;
- Details about how or if the premiums will increase over time.

In order to improve consumer comprehension of funeral insurance products consideration should be given to requiring disclosure in a prescribed form. That form should include:

- Both visual and verbal disclosure;
- Disclosure that is specific to the individual consumer, including about associated risk and costs;
- Be in plain English;
- Be in the form of an infographic.2

We note however that disclosure can be of limited value for some vulnerable consumers, particularly those with poor financial and English literacy. We are therefore of the view that a suitability test, requiring insurers to disclose the above matters in addition to the matters already required to be disclosed under the law, is needed to provide adequate protection to vulnerable consumers..

Another approach to improving consumer comprehension is 'performance based regulation' as suggested by Professor Lauren Willis.[3] This type of regulation creates performance standards for consumer comprehension or suitable consumer product use. Providers of financial products are motivated to ensure that customers understand products and purchase appropriate products, in order to comply with regulation. Such an approach can align the interests of industry with the goals of regulators and consumer advocates.

Remedies available for breaches and the right to rescind

As outlined throughout this submission the remedies available to consumers where an insurer has breached consumer protection legislation can be limited and difficult to enforce. We would therefore advocate for clearly articulated consumer rights to claim for detriment suffered including the right to rescind and claim damages in respect of breaches of unsolicited sales obligations and any suitability test developed. Without clearly articulated

[2] By way of example, see factsheet produced by the Insurance in Super Working Group which utilises infographics at Page 32 https://www.superannuation.asn.au/ArticleDocuments/270/ISWG_Consultation_Paper_Draft_Code_of_Practice_150917.pdf.aspx?Embed=Y

[3] See for example: Willis, LE 'Performance Based Consumer Law' (2015) 82 University of Chicago Law Review 1309

relief, available to consumers through easily accessible forums, protections enshrined in legislation have little value. The case studies presented to the Commission demonstrated that without the dedicated intervention of consumer advocates, Ms Walsh and Ms Marika would not have been able to obtain the outcomes they did.

Sales incentives structures

Our casework experience and the evidence presented at the Commission shows that remuneration and incentive policies that reward employees for volume of sales distort sales practices and lead to:

- Breaches of the duty of utmost good faith;
- The sale of insurance policies to cover children in circumstances that are not appropriate;
- Failure to provide insurance to consumers in a manner that is efficient, honest and fair;
- Lack of compliance with internal protocols to prevent conflicts of interest; and
- Provision of insurance in circumstances that are misleading, deceptive and unconscionable.

A change to remuneration structures from sales driven targets towards consumer wellbeing measures would be a step towards remedying this. This should be accompanied by effective deterrence and compliance measures, including better oversight of sales practices and greater penalties for breaches of the law. We consider that ASIC might be able to provide guidance on these issues and discuss this further below.

We refer to evidence presented to the Commission that Select staff members were given training on how to overcome objections and engage in aggressive sales tactics. Regulatory guidance from ASIC should be complemented by a requirement for insurers to provide standardised approved training to its staff members to ensure that sales are made in an ethical way and in accordance with consumer protection legislation.

The role of the regulator

ASIC has regulatory responsibility for the conduct and disclosure obligations of funeral insurers. ASIC's role in taking action in response to misleading conduct is particularly important in relation to funeral insurance because it is a product which by its nature targets the most vulnerable and least financially capable members of the community. In order to fulfil its regulatory obligations, ASIC needs appropriate and sufficient resources to take enforcement action, and to attract high quality staff to the organisation.

In Legal Aid's experience, consumers (particularly Aboriginal consumers) have difficulties identifying legal problems when they arise. Even when they do identify that they have a

legal problem, consumers experience difficulties enforcing their rights without legal representation. Both case studies before the Commission demonstrate this issue.

We consider that the development of ASIC regulatory guidance on appropriate incentive structures and the implementation of internal standards to deter and detect misconduct may assist insurers to ensure that sales are conducted appropriately and in accordance with the law.

We discuss below our view on current proposals to introduce product intervention powers for ASIC.

Question: Is the current regulatory framework sufficient to minimise the risk of sales of unsuitable funeral products to these people, including to avoid the risk of individuals having multiple forms of funeral insurance, and to address the sales of funeral insurance policies to children and young people.

No. The current framework is insufficient to minimise the risk of the sale of unsuitable funeral insurance products. At present there is no overt obligation on product issuers to assess whether an insurance product of any kind is suitable for a consumer. Legal Aid's insurance practice has observed a range of unsuitable insurance products including funeral insurance, consumer credit insurance and other 'junk' insurances. As advocates attempting to assist our clients obtain refunds for the purchase of these products, we are forced to rely on other broader consumer protections such as prohibitions on misleading conduct or unconscionable conduct. These remedies can be difficult to establish and enforce and as noted below are limited by section 15 of the *Insurance Contracts Act*.

In our casework, we consistently see Aboriginal people paying for funeral insurance policies for members of their extended family including children and grandchildren, as well as themselves. We have seen instances of newborn babies being covered by funeral insurance and of children being added to policies as they are born. As outlined above, the introduction of a suitability assessment requirement on insurers may address some of the problems associated with the sale of unnecessary insurance products for children.

We are of the view that the following reforms would minimise the risk of sales of unsuitable funeral products:

1. The introduction of a suitability test for insurance (outlined above);
2. A presumption that insuring children is unsuitable or a total ban (outlined above);
3. A cap on premiums;
4. The introduction of product intervention powers;
5. The extension of unfair terms legislation to insurance products;
6. Amendment of the *Insurance Contracts Act* to allow judicial review of contracts

7. Inconsistencies between state and federal legislation concerning funeral products should be reviewed and rectified;
8. The establishment of a suitable funeral product for vulnerable consumers.

A prescribed cap on premiums

We consider that a legislated cap on the total amount of premiums payable would ameliorate some of the problems associated with the provision of insurance in circumstances where the consumer is likely to pay a significant amount over the agreed benefit. We submit that consumers should not have to pay more than the benefit amount. There are already products like this in the market place that have been developed following *ASIC Report 454*. [4]

We also consider that fixed premiums should be considered so that consumers are not required to pay increasing premiums over their lifetime. We have seen multiple cases where premiums have increased significantly each year resulting in financial hardship or product cancellation. Again, this issue has subsided since the publication of ASIC Report 454 and we have seen most insurers very willing to settle disputes on a confidential basis where increasing premiums were not properly disclosed at the time of contracting.

Product intervention powers (PIPs) and Design and Distribution Obligations (DDOs)

PIPs and DDOs have the potential to significantly improve outcomes for consumers who are currently sold funeral insurance products. Legal Aid therefore welcomed the opportunity to comment on the exposure draft of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*.

Legal Aid broadly supports the reforms. However, we are concerned that the proposed reforms do not extend to financial products not regulated by the *Corporations Act* and the *NCCPA*. As a result, the PIPs and DDOs would not apply to funeral 'expenses only' products, such as those provided by ACBF. Legal Aid has also emphasised the need for clear and accessible remedies for consumers affected by breaches of DDOs.

Unfair contract terms

We welcome the federal government's current consultation on implementing unfair contract terms in relation to insurance and are strongly supportive of reforms to ensure ACBF and other funeral insurers are subject to unfair terms legislation.

Amendment of the Insurance Contracts Act to allow judicial review of contracts

[4] ASIC Report 454 Funeral insurance: A snapshot

At present section 15 of the *Insurance Contracts Act* prevents a consumer from bringing a claim against an insurer seeking judicial review of the contract on the ground that it is 'harsh, oppressive, unconscionable, unjust, unfair or inequitable'. This means relief available under the *ASIC Act* for unconscionable conduct is limited to pre-contractual conduct and severely curtails a consumer's remedies in respect of an unjust contract and in respect of misrepresentation. We are strongly of the view the Insurance Contracts Act should be amended to be brought in line with the consumer protections available to consumers in respect of other consumer contracts such as credit. The evidence presented to the Commission about the ACBF contracts demonstrates that such limitations significantly impair a consumer's access to justice.

Interaction between state and commonwealth laws

Currently, the relationship between the Commonwealth and State regulation of funeral products, such as through the *Funeral Funds Act* is unclear. The *Funeral Funds Act* does not exclude insurance or 'expenses only' products, and enforcement of the legislative obligations by the Office of Fair Trading has been limited. In addition, the *Funeral Funds Act* does not provide consumers with any right to claim for breach of the obligations. This creates uncertainty for consumers as well as product issuers about the application of regulations and makes the resolution of disputes unnecessarily challenging. A review of the regulation affecting funeral products should occur with a view to streamlining regulation and clarifying the application of State and Commonwealth jurisdiction.

The need for a suitable product or service

The evidence presented to the Commission, supported by Legal Aid's casework, demonstrates there is a significant need for a suitable, safe and affordable product or system for vulnerable members of our community to pay for funerals. In our view such a product or service could be provided appropriately by the Federal Government to low income earners and should include the following:

- Affordable payments;
- Total cost capped at benefit amount;
- Cover that does not cease;
- Protections from the risk of cancellation due to non-payment;
- Features or terms that are easy to understand.

Products co-designed with Aboriginal communities are more likely to ensure that they are appropriate to meet the needs of the community.

Centrelink could be used a means to access the product and funeral bonds could provide a useful template for a product that may be better suited to the needs of vulnerable consumers.

Question: Does the current regulatory framework deal adequately with the potential for people with funeral insurance policies to pay more in premiums than may ever be paid out?

No. We refer to our submissions above regarding the need for better disclosure, a prescribed cap on premiums and the need for a suitability assessment requirement.

Question: Should the current regulatory framework be modified to include protections for holders of funeral insurance in relation to the cancellation of their policies for non-payment of premiums?

In Legal Aid's experience, non-payment of premiums often occurs because:

- The premiums are not affordable for the consumer at the time of contracting;
- The consumer experiences financial hardship at a later date due to rising premiums or changed circumstances;
- Unforeseen circumstances impact on the consumer's ability to pay for a product in such a prolonged way, such as having to travel for cultural events and funerals, incarceration, homelessness, or relocating.

Extension of grace periods

The evidence presented to the Commission and Legal Aid's casework experience shows that non-payment of premiums and the associated cancellation of policies is a significant issue in Aboriginal communities. We support ASIC's recommendation for longer grace periods than the 28 days required by law particularly where policies have been in place for a long time.

Financial hardship variations

If a suitability test is introduced, policies which would otherwise cause substantial financial hardship would be unlawful and this in turn, would reduce the incidence of cancellation due to non-payment of premiums. Where a policy later becomes unaffordable, insurers should be required to offer financial hardship variations. Provisions should be introduced that are modelled on the obligations required of credit providers in the NCCPA.

Right to a refund

Consumers currently have a right to the return of some of their premiums when proactively cancelling under section 207 of the *Life Insurance Act*. However, in our experience, this

section is underutilised, its operation is vague and it relies on actuarial information from the insurer which the consumer does not have access to. In our view, the right to and details of, a surrender amount should be disclosed to consumers at the point of sale.

Further, there should be a right to a surrender amount even in circumstances where there is cancellation due to non-payment of premiums. This would require amendment to the *Life Insurance Act* to ensure clarity about this right as it relates to funeral insurance.

Question: Should estimates of the total cost of funeral products be given?

Yes. We support findings of ASIC Report 454 and its recommendation that estimates of total costs should be provided by funeral insurers. We consider that it is a breach of the duty of utmost good faith not to disclose total costs. However, breaches of this duty are difficult to enforce. We refer to our submissions regarding matters to be disclosed at the point of sale.

Case studies: ANZ and Indigenous consumers

Question: do banks take sufficient steps to promote the availability of fee-free accounts to eligible customers?

Through our experience assisting Aboriginal people with consumer complaints we often see people whose sole income is Centrelink being charged multiple dishonour fees on their accounts, often in relation to multiple direct debits, due to having insufficient funds. This leads to further financial hardship and debt. The evidence presented to the Commission suggests that it is likely many of our clients are not being offered fee free accounts. Income information of consumers is readily available to banks and should be used to identify that a customer is eligible for a fee-free account. We are strongly of the view that banks should be engaging ethically and responsibly with consumers, especially those on low incomes.

Are banks' identification requirements appropriate for Aboriginal and Torres Strait Islander customers? If so, are those identification requirements sufficiently understood and implemented by staff on the ground?

We do not have sufficient casework experience related to the identification requirements imposed by banks to comment on that aspect of the question.

However, our casework supports evidence presented to the Commission that identification issues arise for Aboriginal people during the course of attempting to access many different government and non-government services.

In our experience, some of those issues are:

- Lack of any identification documents or lack of approved forms of identification;
- Difficulties in obtaining birth certificates and/or photo identification because of:

- cost
- lack of approved identification
- difficulties getting identification certified due to geographic location
- high prevalence of unregistered or unrecorded births
- the use of various names or multiple spellings
- inaccuracies in current identity documents such as spelling mistakes or misstated dates of birth.

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**), which sets out the requirements for customer identification and verification for banks also provides sufficient scope for flexibility. Given that Aboriginal people living in remote areas are likely to be considered low risk, applying flexibility in the context of enabling such customers to access basic bank services, is appropriate. Flexible and culturally appropriate guidelines for identification should be actively pursued by financial institutions subject to the AML/CTF Act.

Question: Do financial services entities have in place appropriate policies and procedures to assist Aboriginal and Torres Strait Islander people to overcome obstacles associated with geographical remoteness, to address the cultural barriers to engagement that some of these people face, to address the linguistic barriers to engagement that some of these people face, and to address the obstacles posed by the financial literacy levels of some of these people? And, if appropriate policies and procedures are not in place, what changes should be made to those policies and procedures to deal with those matters?

Significant changes are required to our financial systems to deal with the barriers faced by Aboriginal people in accessing financial services. As already noted those barriers include:

- geographic remoteness of Aboriginal customers;
- obstacles posed by financial literacy levels;
- obstacles posted by the failure of financial services to take account of cultural and linguistic differences.

Our submission does not propose to set out in detail the changes that would be required.

Banks and other financial service providers should engage with the Aboriginal communities they service and allow those communities to inform them about the way that current practices impact access and the solutions to those problems. In order to do this, at a minimum financial service providers need to collect data about whether they have Aboriginal customers and identify where those customers reside.

Financial services providers should consider implementing meaningful Reconciliation Action Plans as a means of identifying and documenting:

- Any objectives in relation to servicing Aboriginal customers;

- Any other objectives in relation to social corporate responsibility that can benefit the Aboriginal community;
- Measures for achieving those objectives.

In our experience as service providers to Aboriginal communities, employment of Aboriginal staff and staff with specialised experience and knowledge of the disadvantage experienced by Aboriginal people is a key component of enabling access to services.

Specialised and local services designed for and with Aboriginal people are most effective in removing barriers to accessing those services. Banks could consider implementing outreach services to locations with high levels of Aboriginal customers to enable those customers to have access to basic banking services. For example, to identify and assist eligible Aboriginal customers to open fee-free bank accounts. We would caution against using outreach services to sell discretionary products such as loans and/or insurance.

We reiterate our concerns set out above in relation to issues with identification and the need for flexibility.

Question: should more banks have a telephone service staffed by employees with specific training in assisting indigenous consumers?

Yes. Banks should also have Aboriginal specialists available in branches with high proportions of Aboriginal customers.

In Legal Aid's service delivery experience, Indigenous specific phone line services which are commonly provided by government agencies, are a means of addressing problems with accessibility and ensure that Aboriginal customers are able to speak to staff members with an understanding of Aboriginal people and the particular disadvantages they might experience in attempting to access a service.